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NOTE AND COMMENT

THE WRIT OF PROHIBITION—PROCEDURAL DELAY.—A disheartening recrudescence of procedural red-tape is found in a recent decision of the Supreme Court of Ohio. A contest arose over the jurisdiction of the Public Service Commission to fix telephone rates in Cleveland. The Commission was engaged in a determination as to the reasonableness of a schedule of rates filed by the telephone company, when a petition was filed in the Common Pleas Court for an injunction against the charging of rates other than those fixed by a city ordinance.

Believing that under the statute the Public Service Commission had exclusive jurisdiction over the subject of rates, and that the assertion of jurisdiction by the Common Pleas court was a usurpation, the telephone company applied to the Supreme Court for a writ of prohibition to the Court of Common Pleas. The writ was denied on the ground that the case was not a proper one for its use. *State ex rel. Cleveland Telephone Co.* v. *Court of Common Pleas*, (Ohio, 1918), 120 N. E. 335.

Three judges held that the writ should not issue. Two, WANAMAKER and JONES, J. J., believing that professional concern over *remedy* should yield to public interest in *relief*, wrote vigorous opinions sustaining the use of the writ as the only adequate method of quickly settling a serious conflict in jurisdiction over rates.

The case was one peculiarly and strikingly within the spirit and intent of the common law doctrines relating to the writ of prohibition. Jurisdiction being fundamental, inferior courts should be promptly and authoritatively informed of any usurpation. The matter goes to the very heart of judicial action, lies at the threshold of litigation and is readily determin-

able in advance of the merits of the case. No other question lends itself so readily to preliminary determination by a superior court. In none is a prompt decision so signally beneficial to all parties and to the public.

But the court was deaf to all such considerations, and rather than depart a hair's breadth from the technical restrictions upon the use of the writ which it strove to establish with a zeal worthy of a better cause, it was entirely willing to force the parties to a hearing in the Common Pleas, then to an appeal to the Court of Appeals and finally to a second appeal to the Supreme Court, in order that they might again present to it the identical question which was already before it and which had been fully argued by the parties.

The majority of the judges in effect hold that the writ will not issue to a court of general jurisdiction such as the Common Pleas, because that Court is competent to pass upon its own jurisdiction. It was admitted that the statute gave the Supreme Court express authority to issue the writ. This would be unnecessary unless the courts of general jurisdiction were to be subject to the writ, for lesser tribunals could be controlled by the Common Pleas courts. Obviously the authority was conferred upon the Supreme Court in order to give it a centralized control over all tribunals of the state. And this is strictly in harmony with the theory underlying the writ. As said by the Supreme Court of South Carolina, in *Ex parte Bradley,* 9 Rich. L. 95, "The process of prohibition arises from the fact that the supreme authority commits the administration of justice to a variety of tribunals, which creates a necessity that a superintending power shall exist, and be exerted upon fit occasion, to restrain each within its prescribed orbit, and so prevent intolerable confusion and disorder."

Other courts have taken an attitude very different from that shown in the case under review, such as the Court of Appeals of New York, which said in *Quimbo Appo* v. *The People,* 20 N. Y. 531, 542: "The writ was never governed by any narrow technical rules, but was resorted to as a convenient mode of exercising a wholesome control over inferior tribunals. The scope of the remedy ought not, I think, to be abridged, as it is far better to prevent the exercise of an unauthorized power than to be driven to the necessity of correcting the error after it is committed."

As a matter of fact, there is no general rule forbidding the use of the writ of prohibition against courts of general jurisdiction. The books are full of cases where the writ has issued to such courts. *People* v. *Superior Court,* 100 Cal. 105; *Maslean* v. *Wayne Circuit Judge,* 52 Mich. 257; *State ex rel.* v. *Benton,* 12 Mont. 66; *State ex rel.* v. *Superior Court,* 12 Wash. 677; *State ex rel.* v. *Ross,* 122 Mo. 435; *People ex rel.* v. *Court of Common Pleas,* 43 Barb. (N. Y.) 278. As said by the Supreme Court of New Mexico in *Lincoln-Lucky Min. Co.* v. *District Court,* 7 N. Mex. 486, "Our district courts are not technically 'inferior' courts, but are relatively inferior to this superintending tribunal, and in the exercise of its 'relative' power this court can properly issue the writ to them."

The insistent demand of the day is for the elimination of unnecessary procedural delays in litigation. As between a quick means and a slow

means of accomplishing the same result, the quick method—other things equal—should be chosen. Procedural regularity is only a means to an end, and should never be accorded any independent value. The great merit of the common law has been its flexibility in meeting new demands and changed conditions, and courts which would rather be orthodox than useful are not true to its liberal spirit.

A striking instance of the progressive attitude toward remedial rules—perhaps extreme, but certainly cheering to a long suffering public,—forming a startling contrast to the Ohio case under consideration, is found in the Michigan doctrine relative to the use of another extraordinary writ,—mandamus. In this state mandamus will issue to compel the vacating of an injunction improperly issued, *Tawas, etc., R. R. C.* v. *Circuit Judge,* 44 Mich. 479, or the vacating of an order appointing a receiver, *Port Huron, etc., R. R. Co.* v. *Circuit Judge,* 31 Mich. 456, in cases where delay will result in serious injury. In the *Tawas Case* the court said: "In granting this remedy courts are always disposed to confine it to cases where there is no other adequate specific remedy. But the existence of a remedy of another nature which is not adequate furnishes no reason for refusing it, if the necessity of justice requires it. Mandamus * * * is from its very nature a remedy that cannot be hampered by any narrow or technical bounds."

In these mandamus cases the court, impressed with the need for a speedy adjudication by the court of last resort, used the writ as a substitute for a summary appeal. In the prohibition case in Ohio there was the same or a greater need for a speedy adjudication, and the writ of prohibition offered a perfectly suitable means for getting it, but the court, with a splendid opportunity before it to show an enlightened appreciation of its obligation to serve the public could not get out of the rut of technicality. The case is illustrative of a reactionary judicial attitude which fails to see that the modern world has no patience with procedural red tape, but is interested in procedural rules solely as a means for making the courts more efficient agencies for judicial administration. E. R. S.

THE LUSITANIA—DESTRUCTION OF ENEMY MERCHANT SHIPS WITHOUT WARNING.—On February 4, 1915, the German government proclaimed a war zone including the waters surrounding Great Britain and Ireland, and gave warning that every enemy merchant ship found within the zone would be destroyed. The proclamation anticipated that in the execution of measures of destruction it would not be "always possible to avert the dangers threatening the crews and passengers." A memorial issued at the same time warned neutral powers "not to continue to entrust their crews, passengers, or merchandise to such vessels." This extraordinary program was justified principally as a measure of retaliation for Great Britain's alleged violations of the law of nations in the conduct of the war against Germany. (See AM. JOURN. INT. LAW Suppl. (1915), Vol. IX, Special Number, pp. 83 ff., 129-141, 149, 155).

The tragic consequences of this policy of retaliation reached an early